No. 08-981

In the Supreme Court of the United States

FATHI Y.M. YUSUF, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES AND THE GOVERNMENT OF THE VIRGIN ISLANDS IN OPPOSITION

ELENA KAGAN
Solicitor General
Counsel of Record
JOHN DICICCO
Acting Assistant Attorney General
ALAN HECHTKOPF
KAREN QUESNEL
S. ROBERT LYONS
Attorneys
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTION PRESENTED

Whether a mail fraud scheme to defraud the United States Virgin Islands of taxes due on gross receipts, in violation of 18 U.S.C. 1341, generates "proceeds" within the meaning of 18 U.S.C. 1956(a)(2)(B)(i), the international money laundering statute.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Statutes:

Statutes—Continued: Page

Miscellaneous:

Miscellaneous—Continued: Page

In the Supreme Court of the United States

No. 08-981

FATHI Y.M. YUSUF, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES AND THE GOVERNMENT OF THE VIRGIN ISLANDS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-26) is reported at 536 F.3d 178. The opinion of the district court (Pet. App. 27-47) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 17, 2008. A petition for rehearing was denied on September 2, 2008 (Pet. App. 52-53). On November 25, 2008, Justice Souter extended the time within which to file a petition for a writ of certiorari to and including January 30, 2009, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioners, a corporation and five individuals, are charged with mail fraud, in violation of 18 U.S.C. 1341; money laundering involving the proceeds of the mail fraud, in violation of 18 U.S.C. 1956(a)(2)(B)(i); and various other criminal offenses under the laws of the United States and the United States Virgin Islands (USVI). The district court entered a pre-trial order dismissing the money laundering charges. Pet. App. 27-47. The court of appeals vacated the district court order and remanded for further proceedings. *Id.* at 1-26.

1. Because the district court dismissed the indictment before trial, the following facts are drawn from the allegations of the indictment. Petitioner United Corporation (United) is a family-owned business that operates Plaza Extra Supermarkets, a chain of three stores located on St. Thomas and St. Croix in the USVI. Petitioner Fathi Yusuf is United's primary owner. Petitioner Maher "Mike" Yusuf, one of Fathi's sons, is a part-owner of United and manages one of the Plaza Extra stores. Petitioners Waheed "Willie" Hamed and Waleed "Wally" Hamed are Fathi's nephews and manage the other two Plaza Extra stores. Petitioner Nejeh Fathi Yusuf is a relative and also participates in the management of the stores. Defendant Isam "Sam" Yousuf is a fugitive and is not a party to the petition. Pet. App. 3; Pet. ii.

Because United conducts business in the USVI, it is obligated to pay to the USVI a four percent tax on its gross receipts. In particular, V.I. Code Ann. tit. 33, § 41(a) (1994) provides, in pertinent part, that "[e]very individual and every firm, corporation, and other association doing business in the [USVI] shall report their gross receipts and pay a tax of four percent (4%) on the

gross receipts of such business." The Virgin Islands Code further provides that a business subject to the payment of gross receipts taxes shall file a return each month and that "[t]he returns and payments required by this subsection shall be due within 30 calendar days following the last day of the calendar month concerned." V.I. Code Ann. tit. 33, § 44(c) (Supp. 2008).

In July, 2001, the Federal Bureau of Investigation (FBI) received a suspicious activity report (SAR) from the Bank of Nova Scotia in St. Thomas reporting suspicious financial transactions involving United. The SAR stated that, during the four-day period from April 16, 2001, through April 19, 2001, $1,920,000 in currency, in denominations of $50 and $100 bills, was deposited into United's account at the bank. The FBI commenced an investigation, which revealed that petitioners had conspired to avoid reporting $60 million of the supermarkets' gross receipts on United's monthly USVI gross receipts tax returns and had failed to pay to the Government of the Virgin Islands the tax owed on the unreported gross receipts. The investigation further revealed that petitioners had engaged in various efforts to disguise and to conceal their illegal scheme and its proceeds. Pet. App. 4-5.

In September 2004, a grand jury in the USVI returned a third superseding indictment (Indictment) charging petitioners with criminal offenses arising out of the scheme. The Indictment charges that, after the supermarkets' receipts were collected each day, the funds typically were transferred to a room called the "cash room," to which only certain individuals, including petitioners, were permitted access. In the cash room, supermarket employees counted the receipts and prepared bank deposit slips. At petitioners' directions, em-

ployees withheld from deposit substantial amounts of cash received from sales, typically in denominations of $100, $50, and $20. That cash was instead delivered to one of the individual petitioners or placed in a designated safe in the cash room. From 1996 through 2001, tens of millions of dollars in cash was withheld from deposit in this manner and was not reported as gross receipts on tax returns filed by United using the United States mail. Pet. App. 4 n.2, 5, 7; Indictment para. 12.

The Indictment further alleges that petitioners engaged in various efforts to disguise and to conceal the illegal scheme and its proceeds. For example, petitioners purchased, and directed the supermarkets' employees and others to purchase, cashier's checks, traveler's checks, and money orders with unreported cash, typically from different bank branches and made payable to individuals and entities other than petitioners, in order to disguise the cash as legitimate financial instruments. Petitioners structured the amounts of the checks and money orders to evade the legal requirement that banks keep records and file reports of cash transactions with the United States Department of the Treasury. Petitioners then caused the checks and money orders to be deposited into foreign bank accounts controlled by the individual petitioners. Pet. App. 5 & n.3, 6 & n.6, 7-8; Indictment paras. 15-22, 35, 37.

The Indictment charges petitioners with conspiracy to commit mail fraud and to structure financial transactions in order to evade reporting requirements, in violation of 18 U.S.C. 371; conspiracy to commit money laundering, in violation of 18 U.S.C. 1956(h); mail fraud, in violation of 18 U.S.C. 1341; international money laundering, in violation of 18 U.S.C. 1956(a)(2)(B)(i)); structuring financial transactions to evade reporting require-

ments, in violation of 31 U.S.C. 5324(a)(3) and (d)(2); causing the filing of false tax returns, in violation of 26 U.S.C. 7206(2); obstruction of justice, in violation of 18 U.S.C. 1503; and various offenses in violation of USVI law. The indictment also contains an asset forfeiture allegation, pursuant to 18 U.S.C. 982, and an asset forfeiture allegation pursuant to USVI law. Pet. App. 5 & n.5.

As relevant here, Counts 44 through 52 of the Indictment allege substantive international money laundering offenses, in violation of 18 U.S.C. 1956(a)(2)(B)(i). That provision criminalizes the transportation of "a monetary instrument or funds from a place in the United States to or through a place outside the United States * * * knowing that the monetary instrument or funds involved in the transportation * * * represent the proceeds of some form of unlawful activity and knowing that such transportation * * * is designed in whole or in part * * * to conceal or disguise the nature, the location, the source, the ownership, or the control of the proceeds of specified unlawful activity." *Ibid.*[1]

The Indictment alleges that petitioners violated Section 1956(a)(2)(B)(i) by transporting funds from the USVI to Amman, Jordan, knowing that the funds in-

[1] Count 2 of the Indictment alleges a conspiracy to commit the offenses charged in Counts 44-52, in violation of 18 U.S.C. 1956(h), which criminalizes conspiring to commit any substantive offense defined in Section 1956. Indictment para. 28. Paragraphs 66 through 71 of the Indictment allege that proceeds of the money laundering offenses should be forfeited to the United States under 18 U.S.C. 982. Because both the district court and the court of appeals determined that the validity of those charges depends on the validity of the substantive money laundering charges, Pet. App. 8, 34, 41, the government does not discuss the money laundering conspiracy and forfeiture charges independently in this brief.

volved the proceeds of the specified unlawful activity of mail fraud. Indictment para. 33; see 18 U.S.C. 1956(c)(7)(A) (defining "specified unlawful activity" to include offenses listed in 18 U.S.C. 1961(1)); 18 U.S.C. 1961(1) (listing the offense of mail fraud, in violation of 18 U.S.C. 1341). The indictment alleges that petitioners committed mail fraud by defrauding the USVI of gross receipts tax revenue belonging to the USVI through the mailing of false USVI tax returns that understated the amount of United's gross receipts. Indictment paras. 30-31.

2. Petitioners filed a pre-trial motion to dismiss the money laundering charges, contending that "tax savings" resulting from filing false returns do not "represent the proceeds of some form of unlawful activity" within the meaning of the money laundering statute. Pet. App. 8. The district court granted the motion. *Id.* at 32-34, 43. The court reasoned that the "'[p]roceeds' are something which is obtained in exchange for the sale of something else as in, most typically, when one sells a good in exchange for money." *Id.* at 33 (quoting *United States* v. *Maali*, 358 F. Supp. 2d 1154, 1158 (M.D. Fla. 2005), aff'd *sub nom. United States* v. *Khanani*, 502 F.3d 1281 (11th Cir. 2007)). Under that definition, the court concluded, "it is clear that the term does not contemplate profits or revenue indirectly derived . . . from the failure to remit taxes." *Ibid.* (quoting *Maali*, 358 F. Supp. 2d at 1160).[2]

---

[2] For the same reason, the district court also dismissed the charge of conspiracy to commit money laundering, struck from two structuring counts the sentence-enhancing allegations grounded upon money laundering, and dismissed the paragraphs of a criminal forfeiture allegation which were grounded upon money laundering. Pet. App. 33, 41, 43. As discussed in note 1, *supra*, because the lower courts viewed those

The government filed a motion for reconsideration, pointing out that, even assuming the district court was correct that "tax savings" fraudulently retained by a taxpayer do not constitute "proceeds" for purposes of the money laundering statute, the indictment charges that the tax revenue at issue was deposited into non-corporate financial accounts controlled by the individual petitioners, in whose hands, the government argued, the funds were neither "retained" nor "tax savings." See Pet. App. 49-50. The district court denied the government's motion, reiterating the court's view that "[s]aving legitimately-earned money by mailing a false individual tax return does not change the nature of the money retained to money illegally obtained for the purpose of the money laundering statute." *Id.* at 49.

3. The court of appeals vacated the district court's orders and remanded for further proceedings. Pet. App. 1-26. The court of appeals first observed that no one disputed that the indictment sufficiently alleges mail fraud based on the mailing of false gross receipts tax returns. *Id.* at 11; see *Pasquantino* v. *United States*, 544 U.S. 349, 356 (2005) (upholding wire fraud charges based on scheme to deprive Canada of its entitlement to excise taxes on imported liquor because that deprivation inflicted "an economic injury no less than had [the defendants] embezzled the funds from the Canadian treasury"). The court also noted that no one disputed that mail fraud may be a predicate offense for a charge of international money laundering. Pet. App. 11. "The narrow issue," the court stated, "is whether unpaid taxes unlawfully disguised and retained by means of the filing

---

charges as dependent on the validity of the substantive money laundering charges, this brief does not independently address their validity.

of false tax returns through the U.S. mail are 'proceeds' of mail fraud for purposes of sufficiently stating an offense for money laundering." *Id.* at 12.

The court of appeals rejected the district court's view "that to qualify as 'proceeds' under the federal money laundering statute, funds must have been *directly* produced by or through a specified unlawful activity." Pet. App. 14. Instead, the court of appeals held "that funds *retained* as a result of the unlawful activity can be treated as the 'proceeds' of such crime." *Ibid.* The court explained that, although the money laundering statute does not define what constitute "proceeds" of specified unlawful activity, the statute identifies a broad array of offenses that constitute "specified unlawful activity," and those offenses include crimes that produce "proceeds" only if that term encompasses property that is unlawfully retained. *Id.* at 13. "For example," the court noted, "the fraudulent *concealment* of a bankruptcy estate's assets is categorized as a "specified unlawful activity." *Ibid.* (citing 18 U.S. 152(1)). Under Section 152(1), the court stated, "property which is required to be included in a bankruptcy debtor's estate but is instead undeclared, and thus *retained*, is 'proceeds' of a bankruptcy fraud offense." *Ibid.*

Applying that understanding of the term "proceeds" to petitioners' offenses, the court of appeals held that "unpaid taxes, which are unlawfully disguised and retained by means of the filing of false tax returns through the U.S. mail, constitute 'proceeds' of mail fraud for the purposes of supporting a charge of federal money laundering." Pet. App. 23. The court explained that petitioners' "fraudulent scheme was that of concealing certain gross receipts from the Virgin Islands government through the mailing of fraudulent tax returns in order to

defraud, cheat, and deprive the government of the 4% gross receipts taxes it was owed, thus enabling [petitioners] to unlawfully retain such government property and profit from their scheme." *Ibid.* In the court's view, "the unpaid taxes, unlawfully disguised and retained through the mailing of the tax forms, were 'proceeds' of [petitioners'] overall scheme to defraud the government." *Id.* at 25.

The court of appeals stressed that its conclusion was consistent with *United States* v. *Santos*, 128 S. Ct. 2020 (2008), which ruled that, in a prosecution under 18 U.S.C. 1956(a)(1)(A)(i) for laundering the "proceeds" of an illegal gambling business in violation of 18 U.S.C. 1955, "proceeds" means the profits, rather than the gross receipts, of the criminal enterprise. See *Santos*, 128 S. Ct. at 2026 (plurality opinion); *id.* at 2033 (Stevens, J., concurring in the judgment). The court observed that, "[b]y intentionally misrepresenting the total amount of Plaza Extra Supermarkets' gross receipts through the mailing of fraudulent tax returns, [petitioners] were able to secretly 'pocket' the 4% gross receipts taxes on the unreported amounts which were the property of the [USVI]." Pet. App. 25. "Other than some small expenses incurred in perpetuating the mail fraud," the court explained, "the unpaid taxes retained by [petitioners] amount to profits" of the fraud, which petitioners subsequently laundered when they sent the money abroad. *Id.* at 25-26.

ARGUMENT

Petitioners contend (Pet. 10-24) that their alleged mail fraud scheme to deprive the USVI of gross receipts taxes to which it was entitled did not generate "proceeds" that petitioners could launder in violation of 18

U.S.C. 1956(a)(2)(B)(i). That issue does not warrant this Court's review at this time.

1. The court of appeals vacated the district court's dismissal of the money laundering charges against petitioners and remanded the case to the district court for a trial on those and other pending charges. Pet. App. 26. The court of appeals' decision is therefore interlocutory, a posture that "of itself alone furnishe[s] a sufficient ground" for the denial of certiorari. *Hamilton-Brown Shoe Co.* v. *Wolf Bros. & Co.*, 240 U.S. 251, 259 (1916); accord *Brotherhood of Locomotive Firemen* v. *Bangor & Aroostook R.R.*, 389 U.S. 327, 328 (1967) (per curiam); *American Constr. Co.* v. *Jacksonville, Tampa & Key W. Ry.*, 148 U.S. 372, 384 (1893); see also *VMI* v. *United States*, 508 U.S. 946 (1993) (opinion of Scalia, J., respecting the denial of certiorari).

The interlocutory character of the court of appeals' decision provides a particularly sound reason for denying review under the circumstances of this case. Petitioners have yet to be tried on the money laundering charges. If petitioners are ultimately acquitted following a trial on the merits, the claim that they raise in their petition will be moot. Because it may prove unnecessary for this Court to address petitioners' claim, it would be premature for the Court to grant the petition.

2. Review by this Court would be premature at this time for an additional reason. Congress is currently giving serious consideration to legislation that, if enacted, would remove any possible doubt that fraudulently retained tax revenues constitute "proceeds" under the money laundering statute. On February 5, 2009, Senator Leahy and others introduced the Fraud Enforcement and Recovery Act of 2009, S. 386, 111th Cong., 1st Sess. (S. 386). See 155 Cong. Rec. S1681-

S1684 (daily ed.). That bill would, among other things, define the term "proceeds" for purposes of 18 U.S.C. 1956 to mean "any property derived from or obtained *or retained*, directly or indirectly, through some form of unlawful activity, including the gross receipts of such activity." S. 386, § 2(f)(1)(B), at 5 (as passed by the Senate) (emphasis added). The bill would also expand the prohibition of the international money laundering statute expressly to cover transactions made "with the intent to engage in conduct constituting a violation of section 7201 or 7206 of the Internal Revenue Code of 1986," which prohibits tax evasion of the type that petitioners allegedly committed in this case. *Id.* § 2(g)(2), at 6.

On March 23, 2009, the Senate Judiciary Committee favorably reported the legislation. S. Rep. No. 10, 111th Cong., 1st Sess. (2009). And, on April 28, 2009, the bill was approved by the full Senate. See 155 Cong. Rec. at S4777 (daily ed.). If the legislation ultimately becomes law, any decision that this Court might render on the issue raised by petitioners would be of no continuing importance.

3. Petitioners' claim does not warrant this Court's review in any event. The court of appeals held that a mail fraud scheme that defrauds the government of tax revenue produces "proceeds" within the meaning of the international money laundering statute, 18 U.S.C. 1956(a)(2)(B)(i). As the court explained, "[p]roceeds" of mail fraud include "funds *retained* as a result of the unlawful activity" that the perpetrators would otherwise have paid to those entitled to the funds. Pet. App. 14.

The various opinions in *United States* v. *Santos*, 128 S. Ct. 2020 (2008), all recognized that, in ordinary usage, the word "proceeds" has two accepted definitions—(1) the total amount produced by an activity and (2) the

net amount produced after the deduction of associated expenses. See *id.* at 2024 (plurality opinion); *id.* at 2031-2032 (Stevens, J., concurring in the judgment); *id.* at 2036 (Alito, J., dissenting, joined by the Chief Justice and Justices Kennedy and Breyer). Under either of those definitions, "proceeds" includes money unlawfully retained as a result of a crime, as well as money unlawfully generated by the crime. See, *e.g.*, 12 *The Oxford English Dictionary* 544 (2d ed. 1989) (defining "proceeds" as "[t]hat which proceeds, is derived, or results from something," as well as "profit"); *The Random House Dictionary of the English Language* 1542 (2d ed. 1987) (defining "proceeds" as "the total amount derived from a sale or other transaction," as well as "profits or returns"); *Webster's Third New International Dictionary of the English Language* 1807 (1993) (defining "proceeds" as "what is produced by or derived from something," as well as "the net profit made on something").

The view that "proceeds" excludes funds retained by fraud cannot be reconciled with the list of offenses designated as "specified unlawful activity" by the money laundering statute. 18 U.S.C. 1956(c)(7). Several of the listed offenses produce "proceeds" only if that term encompasses property that is unlawfully retained. For example, one listed "specified unlawful activity" is the fraudulent concealment of property during or in contemplation of bankruptcy. 18 U.S.C. 152. The "proceeds" of that offense are the property that the debtor unlawfully retains by hiding it from the bankruptcy court. See Pet. App. 13-14 (citing *United States* v. *Brennan*, 326 F.3d 176, 190 (3d Cir.), cert. denied, 540 U.S. 898 (2003); *United States* v. *Ladum*, 141 F.3d 1328, 1340 (9th Cir.), cert. denied, 525 U.S. 898, and 525 U.S. 1021 (1998); and

United States v. *Levine*, 970 F.2d 681, 686 (10th Cir.), cert. denied, 506 U.S. 901 (1992)).

Petitioners argue that "[t]he property involved in bankruptcy fraud is not 'retained' by the perpetrator in the same way that most unpaid taxes are," because "[a]ll of a debtor's property belongs to the estate once the debtor files for bankruptcy, and by concealing an asset from the trustee and the court the debtor is embezzling it from the bankruptcy estate." Pet. 20. Section 152, however, expressly makes it unlawful for a debtor, "in contemplation of" filing for bankruptcy, to conceal "any of his property." 18 U.S.C. 152(7). A debtor violates that provision by unlawfully concealing and retaining his *own* property before it becomes property of the estate. Moreover, numerous other offenses listed as "specified unlawful activity" produce proceeds when the perpetrator retains property (including import duties) that he technically owns but is under a legal obligation to turn over to the government. See, *e.g.*, 18 U.S.C. 541 (effecting the entry of goods into the United States "by the payment of less than the amount of duty legally due"); 18 U.S.C. 542 (entry of goods by false statements); 18 U.S.C. 545 (smuggling goods into the United States). Similarly, courts have recognized that mail fraud, the "specified unlawful activity" charged in this case, can generate "proceeds" by enabling the perpetrator to retain funds that he owes to the victim of the fraud. See, *e.g.*, *United States* v. *Frank*, 354 F.3d 910, 916-918 (8th Cir. 2004) (upholding money laundering conviction based on transactions with the proceeds of a mail fraud in

which the defendant unlawfully retained a car by failing to disclose it as an asset available to satisfy a restitution order).[3]

The conclusion that unlawfully retained tax revenues can constitute the "proceeds" of mail fraud is also supported by *Pasquantino* v. *United States*, 544 U.S. 349 (2005). In *Pasquantino*, this Court upheld the defendants' convictions for wire fraud based on a scheme to evade Canadian liquor importation taxes, holding that "Canada's right to uncollected excise taxes on the liquor [the defendants] imported into Canada [was] 'property' in its hands" within the meaning of the wire fraud statute. *Id.* at 355. Although the Court had no occasion to address whether the unlawfully retained taxes were "proceeds" within the meaning of the money laundering statute, the Court's reasoning supports that conclusion. The Court noted "the economic equivalence between money in hand and money legally due," *id.* at 356, and stated that the defendants' offense was no different than if "they used interstate wires to defraud Canada not of taxes due, but of money from the Canadian treasury," *id.* at 358. See *id.* at 356 (The defendants' "tax evasion deprived Canada of [taxes they were legally obligated to pay], inflicting an economic injury no less than had they embezzled funds from the Canadian treasury."). Indeed, Justice Ginsburg, in dissent, noted that the Court's hold-

---

[3] Even if there were merit to petitioners' argument that unlawfully retained property can constitute proceeds only if it belongs to someone other than the defendant, the argument would not assist the individual petitioners. As the Indictment alleges, the proceeds here are *corporate* funds constituting unpaid *corporate* gross receipts taxes, which funds were transferred from the corporation into financial accounts controlled, in various combinations, by the individual petitioners.

ing would expose defendants who engaged in prohibited transactions with unlawfully retained taxes to penalties under the money laundering statute. *Id.* at 383.

4. Contrary to petitioners' contention (Pet. 10-15), the decision below is not inconsistent with this Court's decision in *Santos*. The issue in *Santos* was whether the term "proceeds" in 18 U.S.C. 1956(a)(1)(A)(i) means the gross proceeds from the underlying unlawful activity or only the profits. A majority of the Court was unable to agree on a definition of "proceeds" for general application. Instead, the Court held only that, in order to establish a violation of 18 U.S.C. 1956(a)(1)(A)(i) based on laundering the "proceeds" of an illegal gambling business in violation of 18 U.S.C. 1955, the government must establish that the alleged laundering transactions involved the profits, rather than the gross proceeds, of the business. See *Santos*, 128 S. Ct. at 2026 (plurality opinion); *id.* at 2033 (Stevens, J., concurring in the judgment).

Because no opinion in *Santos* spoke for the majority of the Court, and none of the various opinions is a "logical subset of other, broader opinions," *United States* v. *Alcan Aluminum Corp.*, 315 F.3d 179, 189 (2d Cir. 2003) (citation omitted), cert. denied, 540 U.S. 1103 (2004), "the only binding aspect of [the] splintered decision is its specific result," *Anker Energy Corp.* v. *Consolidated Coal Co.*, 177 F.3d 161, 170 (3d Cir.), cert. denied, 528 U.S. 1003 (1999). See *Nichols* v. *United States*, 511 U.S. 738, 745-746 (1994) (noting that, in some cases, there may be "no lowest common denominator or 'narrowest grounds' that represents the Court's holding" under the analysis of *Marks* v. *United States*, 430 U.S. 188 (1977)); *United States* v. *Brown*, 553 F.3d 768, 783 (5th Cir. 2008) ("The precedential value of *Santos* is unclear out-

side of the narrow factual setting of that case."). Thus, because the charges against petitioners rest on a different predicate "specified unlawful activity" (mail fraud rather than operating an illegal gambling business), *Santos* does not resolve the meaning of "proceeds" in this case.

Even assuming that *Santos* establishes that "proceeds" means "profits" for purposes of the money laundering charges against petitioners, their scheme to defraud the USVI of gross receipts taxes produced "profits." As the court of appeals explained, "[o]ther than some small expenses incurred in perpetuating the mail fraud—i.e., the postage stamp affixed to their monthly tax return or any other preparation fees relating to the return—the unpaid taxes retained by [petitioners] amounted to profits." Pet. App. 25.

Petitioners argue (Pet. 12-13) that cases like this one present the same "merger problem" that troubled several Justices in *Santos*—the conduct that establishes the predicate "specified unlawful activity" will virtually always also result in liability for money laundering. See Pet. 19-20 (arguing that the decision below "exposes any taxpayer who knowingly underreports a tax liability on a mailed or e-filed federal income tax return to potential prosecution for * * * money laundering"). That is incorrect. As petitioners themselves concede, a scheme to underpay taxes "does not always require that the tax evader engage in[] transactions resembling money laundering to complete the commission of the offense and achieve its goals." Pet. 12. Although everyone who unlawfully defrauds the government of tax revenue is likely to engage in subsequent transactions with those proceeds, those transactions will result in money laundering in violation of 18 U.S.C. 1956 only if they are

made with the intent to promote specified unlawful activity or for the purpose of concealing the unlawful proceeds or avoiding a transaction reporting requirement. To avoid money laundering liability, therefore, all a fraud defendant must do is refrain from engaging in transactions with those purposes.

The money laundering charges against petitioners arise from actions that are entirely distinct from the conduct that constitutes the proceeds-generating offenses of mail fraud. The mail fraud offenses are based on petitioners' mailing false tax returns to the USVI Bureau of Revenue. The money laundering charges, in contrast, are based on petitioners' transferring funds constituting unpaid tax revenue from the USVI to Jordan for the purpose of concealing the nature, location, source, ownership, or control of the proceeds. The international transfers were neither part of the mail fraud scheme nor necessary for its commission.

Petitioners also err in arguing that "[t]his case provides a suitable opportunity for the Court to resolve at least some of the uncertainty and confusion engendered by" *Santos*. Pet. 10. The uncertainty created by *Santos* concerns when "proceeds" means the total amount produced by a crime and when it means the amount produced less expenses. This case does not present that question. Nor does it present an opportunity to shed any light on the answer to that question because, as discussed above, under either definition, "proceeds" includes money unlawfully retained, as well as money unlawfully generated, as the result of a crime. In any event, it would be premature for the Court to revisit the issue in *Santos* at this time because that issue would, like the issue actually presented in this case, be resolved

if Congress enacts the pending legislation that addresses that issue.

5. Petitioners also contend (Pet. 15-23) that the Court should grant review to resolve a conflict between the decision below and *United States* v. *Khanani*, 502 F.3d 1281 (11th Cir. 2007). Although there is a narrow conflict between the two cases, this Court's resolution of the conflict is not warranted at this time.[4]

In *Khanani*, the defendants, who ran clothing businesses, employed aliens who were not authorized to work in the United States, paid the aliens with undeclared sales revenue, failed to pay them overtime wages, and failed to pay employment taxes to the government. 502 F.3d at 1296. The defendants were

---

[4] Petitioners also assert (Pet. 10, 17-18) that the decision below is inconsistent with the position taken by the government more than 15 years ago in *United States* v. *Smith*, No. 92-1612, 1993 WL 346875 (5th Cir. Aug. 11, 1993) (3 F.3d 436 (Table)). In *Smith*, the United States conceded that a mail and wire fraud scheme to deprive the federal government of income taxes did not generate clearly identifiable "proceeds" within the meaning of the money laundering statute. Gov't Br. at 27, *Smith*, *supra* (No. 92-1612). Nevertheless, the government has pursued prosecutions under the theory endorsed by the court below since at least 1997. See, *e.g.*, *United States* v. *Fountain*, 357 F.3d 250 (2d Cir. 2004), cert. denied, 544 U.S. 1017 (2005); *United States* v. *Trapilo*, 130 F.3d 547, 553 (2d Cir. 1997), cert. denied, 525 U.S. 812 (1998); *United States* v. *Miller*, 26 F. Supp. 2d 415, 429 (N.D.N.Y. 1998). The government's policy on the appropriateness of basing mail and wire fraud charges on tax evasion schemes, and of bringing money laundering charges based on transactions involving the proceeds of such fraud, has changed since the government filed its brief in *Smith*. Compare, *e.g.*, *United States Attorneys' Manual* § 6-4.210 (Sept. 2007) with *United States Attorneys' Manual* § 6-4.211(1) (July 1, 1992). And this Court's decision in *Pasquantino* confirms the validity of the theory of prosecution in this case. See *Pasquantino*, 544 U.S. at 354-358 (citing *Trapilo*).

charged with, *inter alia*, encouraging and inducing unauthorized aliens to reside in the United States and conspiracy to conceal, harbor, and shield those aliens (8 U.S.C. 1324(a)(1)(A)(iii) and (iv)); mail and wire fraud based upon the mailing and wiring of false tax returns (18 U.S.C. 1341 and 1343); and conspiracy to launder the proceeds of the immigration and the mail and wire fraud offenses (18 U.S.C. 1956(h)). *Khanani*, 502 F.3d at 1286. The laundered "proceeds" were identified as both the "tax" savings derived from the mail and wire fraud and the "labor cost savings" derived from the immigration offenses. *Id.* at 1296. The district court granted a post-verdict judgment of acquittal on the money laundering charge, and the court of appeals affirmed, relying largely on the district court's reasoning.

The court of appeals agreed "with the district court that 'it is clear that the term ["proceeds"] does not contemplate profits or revenue indirectly derived from labor or from the failure to remit taxes.'" *Khanani*, 502 F.3d at 1296 (quoting *United States* v. *Maali*, 358 F. Supp. 2d 1154, 1160 (M.D. Fla. 2005), aff'd *sub nom. United States* v. *Khanani*, 502 F.3d 1281 (11th Cir. 2007)) (brackets in original). The court of appeals, continuing to quote the district court, explained that, "[w]hile it is natural and clearly correct to say that the Defendants received 'proceeds' from the sale of jeans, it is, by contrast, both causally tenuous and decidedly unnatural to say that the moneys one has received from the sale of a good are, not the 'proceeds' from the sale of a good, but 'proceeds' of the labor used to produce the good." *Ibid.* (quoting *Maali*, 358 F. Supp. 2d at 1160).

Khanani and the decision below are in conflict on the question whether tax revenues unlawfully retained as the result of a mail fraud scheme qualify as "proceeds"

under the money laundering statute. Nonetheless, as the quoted excerpts from the *Khanani* opinion reveal, that issue was not the principal focus of the Eleventh Circuit's analysis in *Khanani*. Rather, its principal focus was whether "cost savings" derived from paying unauthorized aliens less than authorized workers qualify as "proceeds," particularly in light of the attenuated causal connection between the violation and the monetary gain. Because the jury's general verdict finding the defendants guilty of conspiracy to commit money laundering could have rested either on the "cost savings" theory or the unlawfully-retained-taxes theory, reversal would have been required even if the tax theory were valid, unless the error was harmless beyond a reasonable doubt. See *Yates* v. *United States*, 354 U.S. 298, 312 (1957); *Hedgepeth* v. *Pulido*, 129 S. Ct. 530 (2008) (per curiam). It is thus unclear how closely the court of appeals focused on the validity of the unlawfully-retained-taxes theory.

Moreover, the Eleventh Circuit in *Khanani* did not conduct its own analysis of the money laundering statute, and thus did not consider how its result could be reconciled with the statute's list of "specified unlawful activit[ies]," but instead relied almost exclusively on the reasoning of the district court. Nor did the court of appeals consider the impact of *Pasquantino* or have the benefit of the well-reasoned decision of the Third Circuit in this case. Because the Eleventh Circuit may therefore be willing to reconsider the retained-taxes component of its holding in *Khanani*, and because only two courts of appeals have squarely addressed the issue, this Court's resolution of the issue is not warranted at this time. Review at this time is particularly unwarranted because the narrow disagreement among the circuits

may be deprived of any ongoing significance by the legislation pending in Congress.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ELENA KAGAN
Solicitor General
JOHN DICICCO
Acting Assistant Attorney General
ALAN HECHTKOPF
KAREN QUESNEL
S. ROBERT LYONS
Attorneys

MAY 2009

REPLY BRIEF

129

No. 08-981

In The
Supreme Court of the United States

FATHI Y.M. YUSUF, WALEED M. HAMED, WAHEED M. HAMED, MAHER F. YUSUF, NEJEH F. YUSUF and UNITED CORPORATION d/b/a PLAZA EXTRA,

Petitioners,

v.

UNITED STATES and GOVERNMENT OF THE VIRGIN ISLANDS,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

PETITIONERS' REPLY TO BRIEF IN OPPOSITION

GORDON C. RHEA
RPWB LAW OFFICES
P.O. Box 1007
Mount Pleasant, SC 29465

RANDALL P. ANDREOZZI
ANDREOZZI FICKESS LLP
9145 Main Street
Clarence, NY 14221

PETER GOLDBERGER
Counsel of Record
50 Rittenhouse Place
Ardmore, PA 19003-2276
(610) 649-8200

THOMAS ALKON
2115 Queen Street
Christiansted, St. Croix
U.S. Virgin Islands 00820

Attorneys for Petitioners

May 2009

COCKLE LAW BRIEF PRINTING CO (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES – Continued

ARGUMENT IN REPLY

UNITED CORPORATION d/b/a PLAZA EXTRA and five members of the Yusuf family, which own and operate grocery stores in the Virgin Islands, have jointly petitioned this Court for a writ of certiorari to review a judgment and opinion of the Third Circuit.[1] The Brief in Opposition acknowledges a square conflict in the Circuits on the fundamental point of statutory construction which led the district court to dismiss numerous counts of the indictment. Nevertheless, the Solicitor General urges denial of the petition. The proffered reasons are not persuasive. The writ should be granted.

1. The respondents first suggest that certiorari be denied because the decision of the court below reversing the dismissal of the money laundering and forfeiture counts places the case in an "interlocutory . . . posture." Br.Opp. 10. This procedural fact does not deprive this Court of jurisdiction, however; it only presents a factor that may influence the Court's exercise of discretion. *See* Eugene Gressman *et al.*, *Supreme Court Practice* § 4.18, at 280-82 (9th ed. 2007). In this respect, the instant case has little in common with the precedents cited by the government. In the leading cases, all civil, the public importance of

---

[1] *Rule 29.6 Statement:* The stock of United Corporation is not publicly traded. United has no parent corporation, and no publicly held company owns 10% or more of its stock.

the underlying issue was diminished, if not eliminated, by the nature of the remand that rendered the case interlocutory. See *Bhd. of Locomotive Firemen v. Bangor & Aroostook R.R. Co.*, 389 U.S. 327 (1967) (per curiam); *Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251, 257-59 (1916).[2] Not so in the instant case. Moreover, to the extent that the Court's reluctance to accept cases at an interlocutory stage is related to the rule favoring avoidance of the unnecessary decision of constitutional issues, *see* Gressman *et al.*, *supra*, at 281 n.63 (citing an article by Justice Brennan), the policy carries less weight in cases presenting issues of federal statutory construction, as here.

The instant case arises in the precise posture of *Bates v. United States*, 522 U.S. 23 (1997), a case not mentioned in the Brief in Opposition. There, this Court granted certiorari to resolve a one-to-one Circuit split, in a case where the court of appeals had reversed (as here) the dismissal of a federal indictment on a point of statutory coverage. The issue presented by the defendant-petitioner there would still have been

---

[2] In *Hamilton-Brown*, the issue under discussion was whether a prior denial of certiorari added any weight to the opposing party's position in a later review of the merits by this Court. Of course, the holding was that it does not. In the course of discussion, the Court explained some of the reasons why certiorari on the earlier occasion might properly have been denied, lack of finality being one of several. The Court did not address the question of when, notwithstanding its interlocutory posture, a case might be taken up on certiorari.

available to him had he been convicted after the remand for trial, and might even have been mooted by a guilty plea or acquittal on remand. Yet this Court took the case and reviewed the issue on the merits. Indeed, as in the present case, the procedural posture had the effect of sharpening the presentation of the statutory question as a pure matter of law. See also *Solorio v. United States*, 483 U.S. 435 (1987) (case heard on certiorari following reversal of dismissal of indictment for lack of subject matter jurisdiction); *Oliver v. United States*, 466 U.S. 170 (1984) (case heard on certiorari following reversal of order granting motion to suppress evidence).

Here, where the relief to which petitioners would be entitled if they prevail is a dismissal of the most serious charges in the case, and a drastic reduction in sentencing exposure, prudential considerations do not counsel awaiting the results of a potentially lengthy trial that is still in all likelihood a year away.

2. The respondents suggest that review at this juncture "would be premature . . . for an additional reason," Br.Opp. 10, to wit, that the pendency of certain legislation that might render the Circuit split a passing phenomenon. The respondents report that on April 28, 2009, a version of the "Fraud Enforcement and Recovery Act of 2009," S. 386 ("FERA") passed the Senate with a provision that would adopt as law the government's position as approved by the Court below by adding tax evasion as a prohibited objective of international money laundering. Br.Opp. 11. On May 6, 2009, however, the House passed a

different version of FERA which did *not* contain the pertinent amendment to 18 U.S.C. § 1956(a)(2). *See* 155 Cong Rec. H5260-64 (daily ed.). And on May 14, 2009, the Senate concurred in the House version, passing the bill without the international money laundering amendment, and forwarding it to the President for signature. *Id.* S5494 (daily ed.).[3]

In contrast with such other provisions of the Senate Bill as § 2(f) (creating a definition of "proceeds"), which are described as clarifying, the international money laundering amendment rejected by Congress was described in the Judiciary Committee's Report as a provision that would "make it a crime for individuals to transfer or transport money in and out of the United States to evade taxes." S.Rep. No. 111-10, 111th Cong., 1st Sess., at 9 (March 23, 2009). Not only did Congress thus choose not to expand federal

---

[3] Section 2(f) of the Act does, however, adopt the view of the Court below on the issue in the instant case by adding a new definition in § 1956(c) for the term "proceeds," including "any property" that is "obtained or retained" through "some form of unlawful activity." Of course, by virtue of the Ex Post Facto Clause, U.S. Const. art. I, § 9, cl. 3, that provision cannot apply to the instant case (or any other where the alleged criminal activity occurred prior to FERA's future effective date), nor does it shed any retroactive clarifying light on prior Congressional intent. If anything, by amending the statute, Congress supported the view that the current version of the statute is at least ambiguous, requiring strict construction. The new FERA definition also adopts the dissenters' position in *United States v. Santos*, 553 U.S. — , 128 S.Ct. 2020 (2008), with "proceeds" to be defined as "including the gross receipts of such activity."

criminal tax enforcement to cover such cases as petitioners', but it also declared the "sense of the Congress" that:

> no prosecution of an offense under section 1956 or 1957 of title 18, United States Code, should be undertaken in combination with the prosecution of any other offense, without prior approval [of one of certain specified Department of Justice Officials] if the conduct to be charged as 'specified unlawful activity' in connection with the [money laundering] offense is so closely connected with the conduct to be charged as the other offense that there is no clear delineation between the two offenses.

FERA § 2(g)(1) (final version).[4] Congress thus endorsed and echoed the concern with the "merger problem" that this Court highlighted in both the plurality and separate opinions in *Santos*. Because the conflict in the Circuits will persist for cases like the instant one even after the effective date of FERA, the respondents' second reason for denying the petition is unpersuasive.

3. The bulk of respondents' brief addresses the merits. Br.Opp. 11-18. Of course, the fact that an argument can be made on both sides of the question is not a reason for denial of certiorari. To the extent

---

[4] To add teeth to this resolution, the Act requires the Attorney General to report to Congress once a year for five years on the granting and refusal of such approval.

that the respondents' contentions can be viewed as an attempt to show that the Third Circuit was clearly correct, the effort does not succeed.

a. The petition shows that the decision of the Court below is inconsistent with *United States v. Santos*, 553 U.S. — , 128 S.Ct. 2020 (2008), Pet. 10-15, and misapplies this Court's opinion in *Pasquantino v. United States*, 544 U.S. 349 (2005). Pet. 22-23. Respondents fail to refute these arguments. *Santos* holds that "proceeds" in the money laundering statutes means – at least absent contrary legislative history – the "profits" of crime, as represented by the difference between gross proceeds and expenses. The Court chose this definition, in large part, because it was more "defendant-friendly," that is, in better compliance with the rule of lenity. The respondents turn instead to dictionaries, Br.Opp. 12, and make the unrealistic claim that this Court's *Santos* ruling does not govern outside of gambling cases. Br.Opp. 15-16.

Respondents also assert that the underlying (alleged) mail fraud in this case is "entirely distinct" from the money laundering charges, Br.Opp. 17, but that claim is contradicted by the Indictment. The "Introduction" to the Third Superseding Indictment, for example, describes the alleged money laundering activity as part of "various efforts to disguise and conceal the illegal scheme and its proceeds," ¶15; all those facts are then incorporated by reference into Count 1, the alleged mail fraud conspiracy (Supers.Ind. ¶ 23, at 9), and again into the substantive fraud counts (*id.* ¶ 9, at 17). The grand jury's view of the

case thus refutes any assertion that these offenses are "entirely distinct."

Respondents find support for their construction of "proceeds obtained" as including "assets retained," as did the court below, by pointing to the inclusion as "specified unlawful activities" of two types of offenses (out of a long list) which typically generate economic advantage to the perpetrator through savings rather than through gains – bankruptcy fraud and smuggling. Br.Opp. 12-13. The respondents' argument is circular. Criminals who engineer a bankruptcy fraud (such as a "bust-out" scheme) or who organize or carry out a smuggling operation (including a "mule") may obtain "proceeds" when they are paid for their illegal services. Thus, the inclusion of such offenses in the list of "specified unlawful activities" for money laundering purposes is in no way problematic. That those who commit such crimes on their own behalf may generally only generate savings and not illegal fees or other profits, does not in any way tend to prove that such savings constitute "proceeds." It only reinforces the wisdom of this Court's focus on the "merger" issue in the *Santos* opinions.

b. The respondents' attempt to wring support out of *Pasquantino* fares no better. As noted in the Petition, an analysis of what may qualify as "property" of which a victim may be deprived by fraud, does not disclose what can constitute "proceeds" of any of a list of crimes that a defendant may receive and launder. The potential "economic equivalence" of the two,

Br.Opp. 14, does not overcome that fundamental distinction.[5]

4. The Brief in Opposition admits that there is a square conflict between the precedential opinion of the Third Circuit below and that of the Eleventh Circuit in *United States v. Khanani*, 502 F.3d 1281, 1295-97 (11th Cir. 2007). Br.Opp. 18, 19. The respondents nevertheless claim this Court's resolution of that conflict "is not warranted at this time." *Id.* Respondents disparage the Eleventh Circuit's decision on point because it adopted portions of the district court's opinion in that case as its own. Br.Opp. 20. Since the district court's opinion in *United States v. Maali*, 358 F.Supp.2d 1154 (M.D.Fla. 2005), *aff'd sub nom. Khanani*, 502 F.3d 1281, was persuasive and well-reasoned, this criticism is not worthy of response.

---

[5] That the government may have changed its position over the years on the issue presented, Br.Opp. 18 n.4, hardly helps defeat the need for this Court to grant the writ. It only helps to show, at best, that there may be two defensible answers to the question presented – which is a ground to grant, not to deny the writ. And if indeed there are two possible meanings to the statutory language, then the rule of lenity would answer the question in the petitioners' favor. (Of the cases cited in that footnote, however, not one supports the decision of the court below. In *United States v. Miller*, 26 F.Supp.2d 415, 429-30 (N.D.N.Y. 1998), *aff'd*, 7 Fed.Appx. 59 (2d Cir. 2001) (summ. ord.) (non-precedential), the "proceeds" on which the court relied were from the sale of smuggled tobacco on the black market, not from "tax savings." The other two are "revenue rule" decisions, which did not address the "proceeds" question, but rather presented the rather different issue that this Court resolved in *Pasquantino*.)

Similarly, the contention that the Eleventh Circuit did not pay much attention to its own holding on tax savings as an alleged form of "proceeds," Br.Opp. 20, is undeserving of reply.

More important, the respondents' argument that the rejection of the government's "tax savings" theory was but an alternate holding (Br.Opp. 19-20) collapses when it is noted that the "other" theory in *Khanani*, "cost savings," is legally flawed for the identical reasons. That is, for present purposes, *Khanani* did not involve alternate legal rationales, but only one – the holding that is in conflict with that of the court below.

For the foregoing reasons as well as those stated in the petition, the Court should grant a writ of certiorari in this case.

CONCLUSION

For the reasons offered in this Reply and in the original Petition, the requested writ of certiorari should be granted.

Respectfully submitted,

THOMAS ALKON
RANDALL P. ANDREOZZI
PETER GOLDBERGER
Counsel of Record
GORDON C. RHEA

Attorneys for Petitioners

May 19, 2009